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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS EDWIN TILLEY,
PETITIONER,

v.

CHARLES ANDERSON, REGIONAL ADMINISTRATOR OF STATE PRISON OF SOUTHERN MICHIGAN,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the District Court's denial of a Petition for a Writ of Habeas Corpus where the evidence at trial on the essential elements of premeditation and deliberation was insufficient to meet Fourteenth Amendment requirements.

II. Whether the Court of Appeals erred in affirming the District Court's denial of a Petition for a Writ of Habeas Corpus where the Petitioner was denied a fair trial by the trial court's repeated interruptions and criticisms of defense counsel, the court's effective endorsement of the credibility of a critical State's witness, and the court's acquiescence in the prosecutor's intentional misconduct during the course of the trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Dennis Edwin Tilley, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals entered on October 4, 1982.

Opinions Below

The Order of the Court of Appeals for the Sixth Circuit in *Dennis Edwin Tilley* v. *Charles Anderson, Regional Administrator*, No. 81-1782 (Oct. 4, 1982), which affirms the

Order of the District Court, is unpublished and is attached hereto as Appendix A. (A-1). The Order of the Court on the Petition for Rehearing En Banc dated December 27, 1982 has also not been published in official reports. A copy of the Order is attached hereto as Appendix B. (B-1). A copy of the Order of the United States District Court for the Eastern District of Michigan, Southern Division (Pratt, D.J.) dated July 1, 1980, which dismissed the Petition for a Writ of Habeas Corpus, is attached hereto as Appendix C. (C-1). The Report and Recommendation of Magistrate Carlson, dated May 28, 1980, is attached hereto as Appendix D. (D-1).

Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1) to review a judgment of a Court of Appeals by writ of certiorari.

Constitutional Provision

The following provision of the United States Constitution is involved: U.S. Const. Amend. XIV. The text of said provision is attached hereto as Appendix E. (E-1).

Proceedings Below

On November 29, 1973, upon a preliminary hearing, petitioner, Dennis Edwin Tilley, was charged in Wayne County, Michigan of two counts of Murder in the First Degree.

On February 24, 1974, petitioner was convicted of both counts in the Wayne County Circuit Court and sentenced by Judge James N. Canham to two life sentences without possibility of parole. Petitioner appealed his convictions to the Michigan Court of Appeals (*People* v. *Tilley*, 70 Mich. App.

18 (1976)) and to the Michigan Supreme Court (*People* v. *Tilley*, 405 Mich. 38 (1979)) on the grounds, among others, that there was insufficient evidence presented at trial to permit a rational finding of the necessary premeditation for first degree murder, and that remarks and conduct of the trial judge and prosecutor denied him a fair trial.

Petitioner's convictions were affirmed in both courts, with two Justices dissenting in the Supreme Court. Petitioner subsequently sought a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, Southern Division. The petition was dismissed by order of District Court Judge Philip Pratt on July 1, 1980, the Court adopting in full the Magistrate's Report and Recommendation dated May 28, 1980. On November 30, 1981, Judge Pratt granted a Certificate of Probable Cause to appeal to the United States Court of Appeals for the Sixth Circuit.

On October 4, 1982, the Sixth Circuit (Lively and Kennedy, Circuit Judges; and Holschuh, District Judge) entered an Order affirming the judgment of the District Court. Tilley's Petition for Rehearing En Banc was denied by an Order dated December 27, 1982.

Petitioner currently remains incarcerated in the State Prison of Southern Michigan in Jackson, Michigan.

Statement of the Case

The Petitioner was charged with the shooting deaths of Paul Mickel and Ilene Bowdel on November 18, 1973, at approximately 2:30 A.M., at the Nugget Restaurant in Southgate, Michigan.

The record shows that shortly before the shooting Paul Mickel, an off-duty Wayne County Deputy sheriff, entered the Nugget Restaurant in civilian clothes. He sat with several friends and had been drinking for a period of about five hours prior to his arrival at the Nugget.

Tilley entered the restaurant alone and had previously been at a bar where he consumed nine or ten bottles of beer over a four hour period. David Moss, a friend of petitioner's, next entered the restaurant and indicated to several people that he wanted to engage in a fight and that he also had been drinking and was "in a mean mood".

Moss went over to Mickel's table alone and engaged Mickel in an argument. Moss apparently told Mickel to step outside and the two left the restaurant. There is no evidence that Mickel identified himself as a police officer before leaving the restaurant.

Petitioner went outside and stood some distance away from Moss and Mickel. Petitioner testified that he followed Moss and Mickel outside to ensure that none of Mickel's friends intervened to gang up on Moss. Tilley had previously worked as a bouncer himself and was aware that such occurrences were not infrequent.

After leaving the restaurant, Moss and Mickel stood outside and either began to fight immediately or engaged in a brief verbal argument before starting to fight. Mickel deflected Moss' blows and threw Moss against a car several times.

Moss either withdrew or attempted to withdraw a small pistol from his pocket. This was knocked to the ground and retrieved by Mickel who put it in his pocket. At the same time, Mickel withdrew his own gun. He spread-eagled Moss against the car and held the revolver to Moss' side and pressed against Moss' ear.

During the fight a small crowd had gathered and various individuals questioned Mickel's authority. Toth, a restaurant bouncer, came outside and also questioned Mickel's authority. Mickel showed him his wallet and Toth went back inside the restaurant. Ormanian, another restaurant bouncer and a prosecution witness, testified that he was standing beside petitioner at that time and that he (Ormanian) could not tell what Mickel showed Toth. Petitioner himself testified that he never saw any identification to indicate that Mickel was in fact a police officer.

Petitioner remained in the background and continued to demand of Mickel as to what was going on and "why was he doing that stuff". There was testimony that the petitioner was also yelling, "Why don't you shoot me? Just shoot me".

Mickel, who still had Moss against the car, turned partially towards Tilley and Moss partially turned in an attempt to break free. Mickel thereupon struck Moss on the head two or three heavy blows with his gun hand. When Moss later turned himself into the police he had several lumps on his head.

After seeing Mickel strike Moss, petitioner jumped in to the struggle. The evidence indicates that prior to Moss being struck about the head, Tilley merely observed as an agitated bystander with no physical participation whatsoever.

A struggle ensued between Mickel, Moss and Tilley, or between Mickel and Tilley, and the gun was dropped on several occasions. There is uncontradicted testimony that during this struggle petitioner suffered a blow or blows to the head. Petitioner eventually gained possession of the gun and immediately fired three shots in rapid succession. There was a short pause and then Tilley fired three more shots in rapid succession.

The time interval was described variously as "fairly quick", "not long", "two or three seconds", "a split second", "very quickly", "a few seconds", and a "slight pause". Two State's witnesses indicated that there was no pause.

One of the six bullets fired hit Ilene Bowdel in the chest and killed her as she stood in the vestibule. Mickel suffered five gunshot wounds.

There was uncontroverted testimony that when petitioner fired, he held the gun in both hands, and he was also described by various prosecution witnesses at the time of the shooting as being "beyond reason" and as exhibiting an expression of "pure hate", with eyes "wide open and glossy", teeth "clenched" and face "distorted".

Immediately after the shooting, petitioner threw the gun over his shoulder, got into his car, slammed into another car and drove home. After learning that the victim had died, petitioner turned himself in to the police.

Of the twenty-three witnesses who testified for the State, the testimony of only one differed in any important particulars from the substance of the evidence outlined above. That witness, Susan Primm, testified that looking out the rear of her car, she observed that Moss and petitioner had Mickel spread-eagled against a car. She further testified that Mickel then broke away and was shot by petitioner. She stated that "[a] minute, maybe less" transpired before the first three shots and the next two shots. Her trial testimony contained substantial substantive additions and embellishments to her police statement in which she was directed to give "the full details".

At the conclusion of cross-examination, the defense attempted to introduce the prior written statement made by Miss Primm to the police on the basis of "great discrepancies between [the statement] and her testimony". The trial court refused to admit said statement and commented relative to defense counsel's stated grounds for admission as follows:

> *That is a conclusion on your part, counsel.* Certainly, that remark of counsel should be disregarded by the jury. That is his conclusion. That is his client. *He would like to have you believe that about everything that has been offered.* You are certainly to disregard the remark of counsel.

(Emphasis added).

A motion for a mistrial was made by defense counsel and denied by the court.

Miss Primm's testimony was also subsequently impeached by the testimony of other State's witnesses.

The trial court did not give a jury charge with respect to inconsistencies and impeachment vis-a-vis witness credibility despite the fact that it recognized that Miss Primm's was the only testimony upon which a finding of deliberation and premeditation could be inferred when it refused petitioner's motion to reduce the charge to murder in the second degree.

The record in the instant case also reflects that the prosecutor in both his opening statement and closing argument made reference to the character of petitioner, by referring to Tilley as a "neighborhood bully", although said character had not first been placed in issue by the defense. An objection by defense counsel and a request for a limiting instruction was denied.

On cross-examination, and over timely and repeated objections, the prosecutor was permitted to ask Tilley irrelevant and inflammatory questions going to character and culminating in a question designed to show prior specific acts of petitioner against other persons at a remote time and under different circumstances:

> Put it simply, sir: Have you ever had occasion to come to the aid of Mr. Moss before this night?

Again, objection was made by defense counsel and the following occurred in the presence of the jury:

> The Court: Well, what we may be getting into there, counsel is incriminating. It may be incriminating and I just want to avoid that. I don't know about other people in this law suit.
>
> Mr. Boak: It may be incriminating, certainly, Your Honor. But he is under cross-examination.

In addition, the trial court, throughout the trial, engaged in repeated interruptions and criticism of both defense counsel

and made statements which could be construed as showing partiality or bias, which comments are discussed in greater detail later in this Petition.

Reasons for Granting the Writ

A. The Court of Appeals' Decision That Petitioner Was Not Entitled to Habeas Corpus Relief Despite the Insufficiency of Evidence of Premeditation and Deliberation Is in Conflict With Controlling Case Law of This Court and Other Circuits.

This Court, in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), recognized that the proper standard to be applied in federal habeas corpus proceedings where it is asserted that a conviction in a state was based upon insufficient evidence is as follows:

> [T]he applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Id., at 324.

This Court further held that the standard promulgated by *Jackson* "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.*, at 324 n.16.

The *Jackson* decision required a rejection of the former standard imposed by *Thompson* v. *Louisville*, 326 U.S. 199 (1960) (state court conviction must be affirmed if *any evidence* in the record supports it), and a recognition that habeas corpus relief is required under the Fourteenth Amendment, as interpreted in *In re Winship*, 397 U.S. 358 (1970), upon a finding that the evidence was indeed not sufficient on every essential element of the crime charged.

It is respectfully submitted that the determination of the United States Court of Appeals for the Sixth Circuit in the instant case that "the evidence of deliberation and premeditation was sufficient to support the jury's verdict" (A-2) is not supported by the record. Moreover, it is submitted that the result of the Sixth Circuit's application of the *Jackson* standard to the facts of this case conflicts with the results reached by other panels of the Sixth Circuit and by the Fifth Circuit. *See Stacy* v. *Love*, 679 F.2d 1209 (6th Cir. 1982); *Fuller* v. *Anderson*, 662 F.2d 420 (6th Cir. 1981); *Holloway* v. *McElroy*, 632 F.2d 605 (5th Cir. 1980).

Justice Kelly, in his concurring opinion to the Michigan Court of Appeals' decision affirming Tilley's conviction, anticipated that the issue of the sufficiency of the evidence establishing premeditation and deliberation would divide the Supreme Court of Michigan:

> It is an issue at once cerebral and emotional and very likely to reflect the judicial philosophy of the court which addresses it.

People v. *Tilley*, 70 Mich. App. 18, 47 (1976).

A divided Michigan Supreme Court affirmed the Court of Appeals. *People* v. *Tilley*, 405 Mich. 38 (1979). The majority opinion asserted that its decision was based upon an examination of the totality of the circumstances. In fact, the majority opinion relies entirely on the inherently untrustworthy testimony of a single State witness, which testimony differed in all important particulars from the substantive testimony of the other twenty-two prosecution witnesses.

This witness, Miss Primm, testified that immediately prior to the shooting, the petitioner and his co-defendant had Mickel spread-eagled against a car. The victim then broke free and was shot. The majority opinion determined that this testimony, which was contradicted by the State's other

witnesses, supported the finding that the trier of fact could have concluded that the petitioner premeditated and deliberated. It is respectfully submitted that this testimony, even if believed, is severely lacking; it lacks any probative value with respect to the time lapse between the petitioner's recovery of the gun and commencement of the shooting. This time interval is critical since clearly there must be a sufficient opportunity to form a deliberate and premeditated design to take a life, and the testimony relied upon does not indicate whether the petitioner had such an opportunity.

Miss Primm also testified that the length of time between the first shots and the later shots may have been one minute.[1] This testimony was contradicted by all other witnesses, each of whom testified that the pause was a matter of seconds if, indeed, there was any pause at all. The lack of sufficient evidence of a lapse of time precluded the finding of a deliberate and premeditated design to kill.

In this regard, both the federal and the Michigan courts have recognized that an extremely short interval of time precludes a finding of premeditation and deliberation. In *Bullock* v. *United States*, 122 F.2d 213 (D.C. Cir. 1941), for example, the Court of Appeals held that "there is nothing deliberate and premeditated about a killing which is done within a second or two after the accused first thinks of doing it." *Id.*, at 214. Similarly, in *People* v. *Watkins*, 388 Mich. 717 (1972), the Michigan Supreme Court reversed a conviction holding that a time inteval of "seconds" or "several seconds" was not evidence of premeditation.

It is important to note that two dissenting Justices of the Michigan Supreme Court found in the instant case that there was insufficient evidence at the preliminary hearing to establish probable cause to bind over for trial on the charges of murder in the first degree. They maintained that there was

[1] Every witness except Miss Primm stated that the second volley consisted of three shots rather than two.

sufficient evidence to bind the petitioner over on a charge of second-degree murder only, the evidence being insufficient to warrant a finding of premeditation and deliberation.

The State's evidence presented at trial served only to corroborate the proof presented at the preliminary hearing. The only conflicting evidence at trial was the testimony of the single witness upon whom the majority of the State Supreme Court relied — which testimony, as explained above, was totally unreliable and not a sufficient basis upon which a rational fact-finder could have found proof beyond a reasonable doubt. It is thus apparent that since the State failed to meet its burden of proof at the preliminary hearing stage, the proof at trial must have been unable to meet the higher reasonable doubt standard.

It should be further noted that the United States District Court, in dismissing the petitioner's Petition for Writ of Habeas Corpus, placed considerable weight on the fact that the Michigan Court of Appeals and a divided Michigan Supreme Court "determined that the evidence at trial justified a finding of" premeditation.[2] Thus, at all levels of review, petitioner's conviction has been upheld based on the inherently unreliable testimony of Susan Primm.[3]

In *Holloway* v. *McElroy, supra*, the United States Court of Appeals for the Fifth Circuit, found the evidence supporting petitioner's voluntary manslaughter conviction to be insufficient under the *Jackson* standard of review. 632 F.2d at 641. In support of its theory that the defendant intentionally and maliciously shot the victim and subsequently altered the

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[2] *Magistrate's Report and Recommendation*, May 28, 1980, at p. 3.

[3] Because we are not informed as to the evidence upon which the Sixth Circuit relied in the instant case in determining that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must assume that it adopted the rationale of the District Judge and Magistrate below. The lower court's reliance on the Michigan appellate courts' analysis, however, is improper under *Jackson*. *See Sneed* v. *Smith*, 670 F.2d 1348, 1352 n.2 (4th Cir. 1982), *citing Jackson* v. *Virginia, supra*, at 322 n.15.

evidence to comport with his account of self-defense, the State merely introduced a series of inconsistencies between the defendant's version of the events as related at trial and in interviews with police immediately after the shooting. Relying on the prior contradictory statements, a six-judge majority of the Georgia Court of Appeals held the evidence sufficient to sustain the voluntary manslaughter conviction. *Id.*, at 613. Although the Fifth Circuit found "some" evidence supporting the conviction under the former "no evidence" standard of review, the Court nevertheless held that no rational trier of fact could rely merely on these inconsistencies as support for the conclusion that the shooting was beyond a reasonable doubt, not in self-defense.

In quoting Judge Deen's dissent to the Georgia Court of Appeals decision, the Fifth Circuit recognized that the defendant's sole support for his theory of self-defense was his own statement, and, moreover, that expert testimony revealed that the accused could not have shot the victim from the position alleged. *Id.*, at 613. The dissent characterized these factors merely as "some evidence" that the appellant did not shoot the decedent in the manner claimed, but as insufficient to disprove a theory of self-defense. *Id.*

As distinguished from *Holloway*, the petitioner in the instant case relied not only on his own testimony but on the consistent statements of twenty-two by-standers to support the conclusion that the shooting was a singularly emotional and impulsive response to the pistol-whipping of his friend, rather than a deliberate and premeditated act. Of the State's twenty-three witnesses, only one provided testimony which could even remotely be considered to have established premeditation and deliberation. Not only did the testimony of the State's other twenty-two witnesses impeach that one witness' assertions on this matter, but her trial testimony contained substantial substantive additions and embellishments to her police statement in which she was directed to give "the full details".

Thus, it is clear that the quantum of evidence supporting a conviction in the case at bar was even less than that present in *Holloway*, and review by this Court is necessary to resolve this obvious conflict in results reached by two Circuits.

As the Fifth Circuit determined that the contradictions in Holloway's story failed to disprove his explanation that he fired the shot in self-defense, similarly, in the instant case the discrepancies in testimony between the twenty-two witnesses and the one witness upon whom the lower courts have relied mitigate against a finding of premeditation. As Judge Deen so aptly stated:

> It is a woeful day when the state seeks a conviction of murder on such scant evidence. It is an even sadder day when a jury returns a verdict of guilty of manslaughter based upon so little evidence. But it is even perhaps the most regretful day of all when an appellate court gives judicial sanction to such a result.

Id., at 132-33, 222 S.E. 2d at 903-4.

While the cases of *Fuller* v. *Anderson*, 662 F.2d 420 (6th Cir. 1981), and *Stacy* v. *Love*, 679 F.2d 1209 (6th Cir. 1982), recently decided by the Sixth Circuit, are, in many respects, factually dissimilar from the case at bar, it is nevertheless respectfully submitted that the panel of the Sixth Circuit deciding the instant case applied the *Jackson* standard of review in a manner inconsistent with these other Sixth Circuit decisions.

The *Fuller* court held that there was insufficient evidence to convict the defendant of felony-murder. Fuller was charged with being an aider and abettor in the arson murder of two children who were killed when the house in which they resided was burned. Essentially, the evidence before the jury in *Fuller*, was: (1) a determination by the fire department investigators that the fire was caused by a "Molotov Cocktail"

deliberately thrown at the rear of the house; (2) Fuller was among a group of young men gathered around the house immediately before the fire broke out; (3) one of the boys threw something in the house; and (4) Fuller was seen immediately before and after the fire started looking up and down the alley behind the house.

It is critical to note that the most damaging evidence (*i.e.*, that Fuller was looking up and down as if a "look-out") was elicited, as in the instant case, through the testimony of a single witness, a point the *Fuller* court considered crucial in independently evaluating the evidence. *Id.*, at 424. Moreover, the *Fuller* court was faced with a question of the sufficiency of evidence as to an element of the crime, *i.e.*, specific intent, which element, inasmuch as it concerns the state of mind of the actor, can only be proven through implication. Accordingly, the Sixth Circuit in *Fuller* was especially conscious of the inherent danger in relying on the testimony of one witness. Yet, in the case at bar, the Sixth Circuit upheld Tilley's conviction on the basis that incredible testimony of Ms. Primm was insufficient to establish premeditation and deliberation.

The *Fuller* court was unwilling to hold that a rational jury could find proof beyond a reasonable doubt on evidence that could, at best, be described as "reasonable speculation". *Id.*, at 424. Yet, by letting the verdict stand in the instant case, the Sixth Circuit has permitted that exact result.

In *Stacy*, the Sixth Circuit again determined that a writ of habeas corpus was properly granted in the face of insufficient evidence to support a first-degree murder conviction. Particularly, the Court determined that the prosecution had presented insufficient evidence of sanity to rebut the defendants' evidence of insanity. The Court of Appeals again recognized that the single witness upon whose testimony the jury must have relied was unreliable and that the state had failed to meet its burden on an essential element of the offense charged.

It is respectfully submitted that the disparate manner in which the Circuits, and panels within a single Circuit, are applying the *Jackson* standard on applications for habeas corpus review warrants review by this Honorable Court. At a minimum, it is submitted that review by this Court is necessary to afford petitioner relief consistent with that provided by the Sixth and Fifth Circuits in other cases and protection under the Fourteenth Amendment against a verdict based on less than proof beyond a reasonable doubt of the essential elements of the crime alleged.

B. THE COURT OF APPEALS' DECISION THAT PETITIONER WAS NOT ENTITLED TO HABEAS CORPUS RELIEF DESPITE THE EXPRESSED BIAS OF THE TRIAL COURT AND IMPROPER REMARKS OF THE PROSECUTOR IS CONTRARY TO THE FOURTEENTH AMENDMENT'S DUE PROCESS GUARANTY TO A FAIR TRIAL.

It is respectfully submitted that the trial judge, during the course of the trial below, maintained an extremely hostile attitude towards defense counsel, an attitude which was obviously conveyed to the jury and which prejudiced the jury against the petitioner.

While the judicial conduct may be viewed as caustic and intemperate toward both parties throughout the trial by a judge who was obviously annoyed that a first degree murder (Tilley) and manslaughter (Moss) case involvong the death of a female innocent bystander and an off-duty police officer was consuming six days of court time,[4] the record clearly reflects that, by far, the bulk of the judge's derogatory remarks was

[4] The Sixth Circuit recognized that "some of the [trial court's] remarks to counsel for the prosecution and the co-defendant as well as counsel for the petitioner indicated impatience and dissatisfaction with the course the trial took", but concluded that the "court did not indicate by its words or actions a bias in favor of the prosecution. . . ". (A-2). This conclusion, it is respectfully submitted, is totally belied by even the cold record that a transcript provides.

directed at defense counsel. It is submitted that the judge's sharp and sarcastic comments profoundly discredited petitioner's defense in the eyes of the jury and enhanced the credibility of the prosecution's most important witness, Ms. Primm.

There are numerous interruptions and criticisms made by the trial judge in the instant proceeding which indicate his overt hostility towards the defense, only some of which are described below to provide this Court with an example of what the petitioner and the jury faced at trial:

> [Mr. Wisok—Moss' Attorney]: Do you remember being a preliminary examination...on the 29th day of November, A.D. 1973? I will refer to Page 18 of this and ask you to read this to yourself, starting with here until the bottom of the page.
>
> [Mr. Boak—Prosecutor]: Your Honor, at this time I will interpose an objection. Under what *guise* is defense counsel doing this?
>
> Mr. Wisok: I want to refresh his recollection as to what happened there.
>
> The Court: He doesn't necessarily have to be refreshed. You may think so, but he hasn't said he needed having his recollection refreshed.
>
> Mr. Wisok: This is proper cross-examination.
>
> The Court: I just ruled it isn't. That's all it takes. He doesn't say it needs refreshing. *There's nothing proper about that kind of question.*
>
> Mr. Wisok: Your Honor—
>
> The Court: Get this straight right now in this trial: When I make a ruling, it's a ruling.

(Emphasis added).

The tenor of the prosecution's objection, "Under what guise is defense counsel doing this?" and also that of the court in

stating, "There's nothing proper about that kind of question", would certainly indicate to a jury, unsophisticated in courtroom procedure, that defense counsel was engaged in some intentional attempt at trickery or misconduct. *See, e.g., United States* v. *Kelley*, 314 F.2d 461, 463 (5th Cir. 1963). Clearly, the court, if it felt it necessary to make such comments, should have called counsel to the side bar and made the comments outside the presence of the jury.

Later, while conducting cross-examination of another witness, there was an interruption by the court and additional harsh and injudicious criticism:

> Q: (By Mr. Wisok): He what?
>
> A: He shook the trunk of his body to the left and right.
>
> Q: But he was still being held, wasn't he?
>
> The Court: He was explaining to you, counsel, how he broke the hold. He shifted his body to the right and left and he broke the hold.
>
> Mr. Wisok: I understand that, your Honor.
>
> The Court: No. You don't. Listen to the answer. Now, ask another question.
>
> • • •
>
> Q: I'm afraid you're a little bit ahead of me. We'll get to the gun a little later.
>
> The Court: No, counsel, you're a little bit ahead or away from this case at the moment.
>
> Mr. Wisok: Your Honor, please.
>
> The Court: Just a minute. I'm talking; listen. You're trying to make him say something. Listen to what he says, please, and don't say exactly what you want him to say all the time. Listen to the witnesses. I'm a little tired of this. It's very, very irritating. Listen to the witness.
>
> Mr. Wisok: I think I am, your Honor. I will try.
>
> The Court: I doubt it, counsel, and I've made my point clear. I suggest you listen in the future.

Still later, while petitioner Tilley's counsel was conducting cross-examination:

> (The Witness): Approximately, yes. It could have been five minutes. I'm going by what I think I remember as far as the time.
>
> The Court: If you don't know, it's easy to tell them you don't know.
>
> The Witness: I said roughly eight or ten minutes, meaning I don't know.
>
> The Court: Then you backed down to five. If you don't know, tell them you don't know.
>
> Mr. Ritchie: What was the comment to the witness? I didn't hear that.
>
> The Court: There was no comment to the witness. I said if he doesn't know, he doesn't have to say anything, he can just say, "I don't know". He backed down to five. He already indicated that it may have been five, so he doesn't know. Let's proceed with other questions.
>
> Mr. Ritchie: Wait a minute, your Honor. There's nothing intentional on my part. I heard the witness say eight or ten minutes.
>
> The Court: He went back to five.
>
> Mr. Ritchie: After the Court spoke to the witness, your Honor.
>
> The Court: Is it really important? He doesn't know, that's what's important.
>
> The Witness: I said eight or ten, I don't really know.
>
> The Court: Just a minute witness, hold it. That subject is closed. Cover another subject, counsel.

At this point, the petitioner's attorney asked to address the court in the absence of the jury and objected, on the record, to the above comments. Almost immediately thereafter, while the same witness was undergoing re-direct examination by the prosecutor, the following occurred:

Q: (By Mr. Boak): Mr. Guibard, between the time you first saw Mr. Tilley with the gun in his hand to the time the first shot was fired, what did Mr. Tilley do, if anything?

A: I could not tell you. I saw him standing there with the gun and that was it.

Q: You saw him standing there with the gun?

A: With the gun.

Q: Was he moving or standing?

A: He walked, took a few steps, one or two maybe, I could not really say.

Q: Took one or two steps forward or backward or to the side or what?

Mr. Ritchie: The witness said he could not say. I have had the same experience with this witness. He was instructed not to answer if he did not know. Now, he is not to tell the prosecutor that he does not know.

The Court: *Your reaction is a little bit too much.* The witness had not indicated he does not know. He said two steps.

(Emphasis added).

The foregoing great disparity in the manner in which the trial court dealt with "I don't know" answers from the same witness on direct and cross-examinations would hardly have gone unnoticed by the jury. *See, e.g., Young* v. *United States*, 356 F.2d 793, 795 (D.C. Cir. 1965). Not only did the court belittle and demean defense counsel in these exchanges, but his attitude was certainly indicative of his hostile feelings toward the defense and of an apparent predisposition regarding the case, thus evidencing the fact that the trial judge had overstepped the bounds of "judicial propriety" and that the "veil of judicial impartiality" had been "pierced". *United States* v. *Koenig*, 300 F.2d 377, 379 (6th Cir. 1962).

The judge frequently interrupted defense counsel in an argumentative and belittling manner. For example:

> Q: (By Mr. Ritchie): Did the three or four blows cause Mr. Moss to stagger?
>
> A: No.
>
> Q: Do you remember testifying to the following questions; hearing the questions and giving the following answers: "Q. What was the result of the blows, if any?"
>
> Mr. Ritchie: Page 61, your Honor.
>
> Q: (By Mr. Ritchie): "A. I couldn't see any. *I may have staggered him a little bit.* I couldn't see what it did.
>
> The Court: "What it really did."
>
> Mr. Ritchie: "What it really did."
>
> A: And that's what I told you, but you made me make a definite answer, so I said no.
>
> Mr. Ritchie: Page 62, your Honor.
>
> Q: (By Mr. Ritchie): Do you remembering answering as follows at the preliminary examination: "Q. *Moss staggers and then what happened?*" "A. *Mr. Tilley jumped in.*" "Q. *After Moss staggered, Tilley jumped in?*" A. *Right.*"
>
> Q: Do you remember testifying in that fashion at the preliminary examination?
>
> A: No, I can't remember that.
>
> The Court: Counsel, the deposition is used for two purposes: to refresh one's recollection or to establish an inconsistent prior statement. There is *nothing inconsistent about that statement.* The choice of "stagger" is the choice of the defense counsel in putting two question to the witness. The jury will disregard those last two questions and answers. You may proceed, Counsel.

(Emphasis added).

These comments by the court were certainly, in addition to being demeaning, a foray by the trial judge into an area solely within the province of the jury, *i.e.*, witness credibility. The jury was instructed that there was no prior inconsistency in the testimony of the witness when, in fact, there was evidence from which the jury could have found a prior inconsistency.

Perhaps the most significant misconduct of the trial judge was with regard to the testimony of Ms. Primm. On cross-examination, as detailed in the Statement of the Case, *supra*, this critical State's witness was asked about the signed statement she had given the police immediately following the shooting when the events were still fresh in her mind and in which she had been directed to "give the full details of what she had seen". This witness admitted on the witness stand that there were numerous significant differences of omission from the substance of her police statement and her trial testimony.

At the conclusion of cross-examination, the defense counsel attempted to introduce the prior written statements made by the witness to the police, which offer was seriously rebuked by the trial judge who attacked defense counsel's observation that "great discrepancies" existed with the devastating remark: "He would like to have you believe that about everything that has been offered".

With this remark, along with numerous others, the trial judge destroyed the balance of judicial impartiality by berating and criticizing defense counsel, *see United States* v. *Bartlett*, 633 F.2d 1184 (5th Cir. 1981); by assuming the role of the prosecutor, *see United States* v. *Sheldon*, 544 F.2d 213, 218 (5th Cir. 1976); and by appearing to be an advocate on the issue of the credibility of a critical witness. *See, e.g., United States* v. *Stroble*, 431 F.2d 7273 (6th Cir. 1979). Accordingly, the petitioner was denied a fair trial, and a denial of review by this Court of the trial court's outrageous conduct, coupled with the failure of the reviewing court below to grant appropriate relief, might be viewed as an endorsement of this type of judicial misconduct.

The trial court's prejudicial attitude was, at a minimum, compounded by the conduct of the prosecutor in purposely and knowingly introducing into evidence inadmissible evidence which significantly and irrevocably prejudiced the petitioner's right to a fundamentally fair trial. This evidence, which related to the petitioner's character and alleged propensity to violence, was clearly inadmissible under both federal and Michigan law. *E.g.*, *Michelson* v. *United States*, 335 U.S. 469, 476-477 (1948); *People* v. *Dunn*, 233 Mich. 185 (1925).

In his opening, the prosecutor referred to Tilley as a "neighborhood bully". Timely defense objection was overruled despite the fact that the remark, as recognized by the Sixth Circuit below, was improper. (A-2). *See also*, *United States* v. *Steinkoetter*, 633 F.2d 719 (6th Cir. 1980); *Hall* v. *United States*, 419 F.2d 582, 587 (5th Cir. 1969).

During cross-examination, the prosecutor questioned petitioner about his alleged "physical prowess" and weight-lifting activity. Further, the prosecutor asked Tilley whether he had ever come to Moss' aid before the night of the shootings. Said inquiry was clearly improper, the prejudicial impact of which was severely compounded by the trial court's observation before the jury that the question was incriminating. *See United States* v. *Harris*, 331 F.2d 185, 187 (4th Cir. 1964).

Finally, the prosecutor was permitted to argue during his closing as follows:

> We think that [petitioner's] psychological make-up, what he has told you about himself, what he was thinking that night, the type of person that he is, is the motive for what happened.

The jury was thus improperly encouraged to believe that because petitioner was the type of person the prosecutor believed him to be, the petitioner was guilty of the offenses charged. In reality, this was the evidence upon which the State was compelled to rely in the absence of admissible and probative evidence of premeditation and deliberation.

Perhaps the greatest oversight of the federal and state courts which have reviewed petitioner's conviction below is their failure to consider and address the cumulative impact of the judicial and prosecutorial misconduct in light of the paucity of evidence on the two essential elements of first-degree murder. Clearly, this type of inquiry is required where allegations of improper conduct by the prosecutor have been made. *United States* v. *Feroni*, 655 F.2d 707 (6th Cir. 1981); *Jones* v. *United States*, 338 F.2d 553, 554 n.3 (D.C. Cir. 1964). *See Berger* v. *United States*, 295 U.S. 78, 88-89 (1955). Similarly, where questions of judicial misconduct are present, prejudice will more readily be cognizable where the evidence against the defendant is slim. *See, e.g., Frantz* v. *United States*, 62 F.2d 737 (6th Cir. 1933). *Compare United States* v. *Dark*, 597 F.2d 1097 (6th Cir. 1979).

As has been discussed above, the evidence of premeditation and deliberation in the case at bar was so weak, if not non-existent, that the prejudicial impact of the trial court's and prosecutor's improprieties must be viewed as severe. Indeed, it is submitted that a review of the record will reveal that both the judge's and prosecutor's comments clearly filled the void created by the lack of competent evidence introduced on these essential elements of the offense charged. Accordingly, petitioner was denied a fair trial.

Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. Lee Bailey
Kenneth J. Fishman
109 State Street
Boston, Massachusetts 02109
Tel. No. (617) 723-1980
Attorneys for Petitioner

APPENDIX A

United States Court of Appeals
For the Sixth Circuit

No. 81-1782

DENNIS EDWIN TILLEY,
PETITIONER-APPELLANT,
v.
CHARLES ANDERSON, Regional Administrator
RESPONDENT-APPELLEE.

BEFORE: LIVELY and KENNEDY, *Circuit Judges;* and HOLSCHUH,* *District Judge.*

ORDER

This is an appeal from a judgment of the district court denying petitioner's application for a writ of habeas corpus. Petitioner was convicted of two counts of murder in a Michigan state court and his conviction was affirmed on appeal. In this habeas corpus action the petitioner contended that the evidence of premeditation and deliberation was not sufficient to support the guilty verdict and that he was denied a fair trial by intemperate remarks of the trial judge and misconduct of the prosecutor.

The standard for review of a claim in habeas corpus by a state prisoner that he was convicted on legally insufficient evidence is whether the evidence was such that a rational trier of fact could conclude that petitioner was guilty of the offense or offenses of which the jury convicted him. In this case the petitioner argued in the district court that the evidence of the

* The Honorable John D. Holschuh, Judge, U.S. District Court for the Southern District of Ohio, sitting by designation.

essential elements of deliberation and premeditation required for conviction of murder in the first degree was insufficient. This court does not review the evidence to determine whether it would have reached the same verdict as the jury, but only whether the evidence meets the constitutional standard set forth by the Supreme Court in *Jackson* v. *Virginia*, 443 U.S. 307 (1979). Upon review of the record on appeal and after considering the briefs and oral arguments of counsel this court concludes that the evidence of deliberation and premeditation was sufficient to support the jury's verdict.

The court also concludes that the trial court did not indicate by its words or actions a bias in favor of the prosecution, though some of its remarks to the counsel for the prosecution and the co-defendant as well as counsel for the petitioner indicated impatience and dissatisfaction with the course which the trial took. Further, though the prosecutor made one improper remark in his opening statement in which he characterized the petitioner as a bully, we do not believe that this single error on his part so infected a six-day trial as to render it fundamentally unfair and therefore a violation of due process.

For the foregoing reasons the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
s/ JOHN P. HEHMAN
Clerk

Filed October 4, 1982

ISSUED AS MANDATE: January 4, 1983
COSTS: None

A TRUE COPY
Attest:
JOHN P. HEHMAN, *Clerk*
By: s/ LINDA L. BRINSAN

APPENDIX B

United States Court of Appeals
For the Sixth Circuit

No. 81-1782

DENNIS EDWIN TILLEY,
PETITIONER-APPELLANT,
v.
CHARLES E. ANDERSON,
RESPONDENT-APPELLEE.

BEFORE: LIVELY and KENNEDY, *Circuit Judges;* and HOLSCHUH,* *District Judge.*

ORDER

No circuit judge in regular active service having requested en banc consideration of the petition for rehearing filed herein by the petitioner-appellant, the petition for rehearing has been referred to the hearing panel.

Upon consideration, the court concludes that all issues raised in the petition for rehearing were fully considered upon the original submission and decision of this appeal and that rehearing is not required.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
s/ JOHN P. HEHMAN
Clerk

Filed December 27, 1982

* The Honorable John Holschuh, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 79-73554

DENNIS EDWIN TILLEY,
PETITIONER,
v.
CHARLES ANDERSON,
Regional Administrator of SPSM,
RESPONDENT.

ORDER

The Court has reviewed the file and the Magistrate's Report and Recommendation submitted in accordance with 28 USC § 636(b)(1)(B). The Report and Recommendation regarding Petitioner's Petition For Writ of Habeas Corpus is hereby accepted and entered as the findings and conclusions of the Court.

Now, therefore, IT IS ORDERED that Petitioner's Petition For Writ of Habeas Corpus be, and the same hereby is, DISMISSED.

s/ PHILIP PRATT
PHILIP PRATT
United States District Judge

DATED: July 1, 1980

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 79-73554
Honorable Philip Pratt
U.S. District Judge

DENNIS EDWIN TILLEY,
PETITIONER,

v.

CHARLES ANDERSON,
Regional Administrator of SPSM,
RESPONDENT.

MAGISTRATE'S REPORT AND RECOMMENDATION

RECOMMENDATION: Petitioner's Petition For Writ of Habeas Corpus should be dismissed, as there was sufficient evidence of premeditation, and no constitutionally improper judicial or prosecutorial misconduct, at Petitioner's state trial and conviction of first degree murder.

* * *

Petitioner, a prisoner at the State Prison of Southern Michigan, is presently serving two life sentences imposed by Wayne County Circuit Court Judge James N. Canham, following his February 29, 1974, two count, jury conviction of Murder in the First Degree. His convictions were affirmed in lengthy opinions both by the Michigan Court of Appeals (70 Mich. App. 18) and the Michigan Supreme Court (405 Mich. 38). He brings the instant Petition for Writ of Habeas Corpus, challenging those convictions, in this Court, alleging that there was insufficient evidence presented at trial to permit a rational finding of the necessary premeditation for First Degree Murder and that certain remarks of the trial judge and prosecutor denied him a fair trial.

A full reading of the (1,000 page) transcript reveals the following. At approximately 2:30 a.m., in the early morning hours of Sunday, November 18, 1973, Petitioner arrived alone at the Nugget Restaurant in Southgate, Michigan. A few minutes later, an acquaintance of his, David Allen Moss, came in and the two talked briefly. Shortly thereafter, Mr. Moss walked over to a table where Mr. Paul Mickel, an off-duty Wayne County Deputy sheriff was seated with some friends. Moss grabbed Mickel from behind, said something like "step outside", and then the two walked outside at the front of the restaurant, Petitioner followed the two outside, with one of the restaurant "bouncers" also leaving.

Once outside, words were exchanged between Moss and Mickel. Moss reached for a Derringer, Mickel obtained it, drew his own pistol, and put Moss spread-eagle against a car and put his pistol towards Moss' head. At the request of one of the bouncers, Mickel identified himself as a Deputy Sheriff and showed his badge. Petitioner began taunting Mickel and, when his attention was diverted, Moss broke free. A struggle ensued and Petitioner was able to get the weapon and fired three shots at Mickel. There was a pause, and as Mickel fell into the vestibule-entrance of the restaurant, Petitioner fired three more shots at the officer. One of those shots struck Ms. Ilene Bowdle, a by stander in the vestibule waiting to enter the restaurant, fatally wounding her. Petitioner then fled, throwing the gun away as he left. He returned to his apartment, but then turned himself in to the police.

I - *The Evidence of Premeditation.* In Michigan, as in other jurisdictions, the element which distinguishes First Degree Murder from Second Degree Murder, is that of premeditation. While there is no minimum time required for such premeditation, a defendant must have had time to "measure and evaluate" his actions, not be acting in "hot blood", and have had at least enough time for a "second look". *People* v. *Morrin*, 31 Mich. App. 301, 329-330 (1971).

A. *Before Petitioner Entered the Altercation.* The Prosecutor argued, and there was sufficient evidence for the jury to conclude, that Petitioner, up to the point where Mickel had Moss spread-eagle against the car, had calculatedly determined he would get the officer's gun if he could and kill him if he had the opportunity. Before he entered the altercation, Petitioner had not been involved in the confrontation between Moss and Mickel inside the restaurant. Although he said he had been drinking earlier, one of the bouncers who saw him inside said he did not appear to have been drinking (TR 502) and Petitioner himself said that, before becoming involved, he knew what he was doing (TR 872). Once Mickel had Moss under control, Petitioner began taunting him, hollering "why don't you shoot me" (witness Govin, TR 568); or "put a bullet in me" (witness Grabowski, TR 646). Petitioner himself admitted on the stand that he began "swearing" at Mr. Mickel (TR 855). Furthermore, there was ample evidence for the jury to conclude (notwithstanding Petitioner's denials) that, at the time of the taunting, Petitioner was well aware that Mr. Mickel was a police officer and, as such, someone whom Petitioner thought little of. Witness Primmm, for example, heard Petitioner yell "kill me, Pig" (TR 606)[1] While Petitioner claimed he did not believe Mickel was a police officer, he admitted he heard him say he was a Deputy Sheriff (TR 855), "assumed" the bouncer asked Mickel for his identification (TR 880) saw Mickel show the bouncer something that he did not see (TR 856), and heard somebody say Moss was under arrest (TR 883). He was only a few feet away when the bouncer was

[1] Witness Primm's account of the incident was at substantial variance from that of the other (numerous) accounts (she recalled, for example, that Moss and Tilley had Mickel up against the car) and, for that reason, the undersigned has not referred to her testimony in support of other evidence of premeditation. However, her recollection of Petitioner calling Mickel a "pig" is consistent with Witness Gouin and Grabowski's testimony, and that of Petitioner himself "swearing" at the officer, and therefore was entitled to be believed and accepted by the jury.

shown Mickel's ID (TR 476, 508), and at least one witness from inside the restaurant saw the badge through the window (TR 78). Furthermore, while there was some testimony that Mickel hit Moss after he started to break away, either with his gun or with his arm or wrist, there was testimony that Moss was not hit really hard (witness Maloney, TR 116), was not hurt and did not stagger or fall (witness Ormanian, TR 542, 557), and that nothing unusual about his appearance was noted when he turned himself in (TR 704). Petitioner himself admitted that Moss, at no time, ever called for help (TR 887). If one couples the Petitioner's initial uninvolvement and personal control, and his subsequent unprovoked taunting and disparaging remarks, with that testimony which indicated he fired shots in rapid succession as soon as he got the gun, together with his subsequent flight and disposal of the weapon, there was sufficient evidence from which the jury could rationally have concluded that the intent to kill was formed premeditatively even before Petitioner became involved in the struggle.

B. *After Petitioner Entered the Altercation.* Apart, however, from why, or with what intent, Petitioner became involved in the struggle after Moss had begun to break away from Mickel, there was also ample evidence from which the jury could have concluded he subsequently had time to, and did in fact, form a deliberate intent to kill the officer. First, there was almost unanimous agreement that when Petitioner first obtained Mickel's gun after the struggle, he was at a sufficient distance from his victim to preclude any danger to himself or anyone else. The estimates ran from 3-4 feet (TR 295), increasing (TR 512, 253, 154, 681, 378), up to from 9-10 feet apart (TR 272). Petitioner himself estimated the distance was from 5-6 feet (TR 889).

Secondly, after he first retrieved the weapon, there was testimony that Petitioner did not fire immediately, but waited until the victim began to go toward the vestibule entrance

(witness Ormanian, TR 547), waited almost a minute before firing (witness Guibord, TR 251), waited between 5-10 seconds (witness LaBadie, TR 285), or pointed it at the officer for three seconds before firing (witness Staake, TR 321).

Thirdly, there was evidence that when petitioner did fire the first three shots, the victim was either rising or backing away, with his hands up, from Petitioner (witness Nazelli, TR 154-155; witness Guibord, TR 252; witness LaBadie TR 272). One witness said that Petitioner had both arms out in front of him when he first fired (TR 673).

Fourthly, there was evidence of a discernible break between the first volley of three shots and the second volley fired at the victim after he had reached the vestibule. Witness Maloney said there were between 20 and 30 seconds between the volleys (TR 81, 120), although most of the other witnesses placed the interval at about 3 (TR 158, 321, 531), 4-5 (TR 413), or a "few" seconds, less than a minute (TR 421, 428, 647). There was also evidence that Petitioner literally followed Mickel into the vestibule before firing the second volley of three shots at him (witness Smock, TR 34; witness Ormanian, TR 549) and that he pointed and held the gun with both hands when he fired at the officer in the entrance-way (witness Nazelli, TR 156; witness LaBadie, TR 274).

Finally, it should be noted that five of the six shots fired found their mark in the victim and that Petitioner himself said that he could not remember going into the vestibule or explain why he fired the second volley of shots (TR 891). Furthermore, while Petitioner was described as "glossy eyed" (TR 493) and "beyond reason" (TR 321) he was also described as having "clenched teeth" (TR 493) and exhibiting and expression "pure hate" (TR 360), the latter characteristics as much evidence of grim determination as of irrationality.

When the above is coupled with Petitioner's initial flight and disposal of the weapon, there was certainly sufficient evidence which, if believed, would have justified the jury in

rationally concluding that after he had obtained the victim's gun, Petitioner had the opportunity to, and did in fact, form a deliberate conscious intent to kill Mr. Mickel.

While normally questions as to the sufficiency of evidence do not raise federal constitutional issues, *Gemmel* v. *Buchkoe* 385 F2d 338, 340 (6th Cir. 1966), Petitioner is correct that the constitution minimally requires that the record evidence be sufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979). In the instant case, however, the jury was fully and properly instructed that premeditation was required for First Degree Murder, that it was Second Degree Murder if done under a sudden impulse, and that premeditation required measuring and evaluating, a thought process undisturbed by hot blood, and a second look (TR, Vol. VI, 64-67). A unanimous jury, *a unanimous Michigan Court of Appeals*, and 5 of 7 Michigan Supreme Court justices[2] determined that the evidence at trial justified a finding of premeditated, first degree, murder, and I do not believe that that evidence was constitutionally insufficient.[3]

II - *The Judicial and Prosecutorial Misconduct.* Petitioner next contends that the trial judge exceeded the bounds of fair and impartial comment in his remarks to counsel during the trial. He cites nine specific instances. Four of them, however, were directed to Mr. Wisok, co-defendant Moss' attorney: "I will not allow a violation of the rules" (TR 47-48); "When I make a ruling, it's a ruling" (TR 133); "Don't say exactly what you want him to say all the time" (TR 239); "He [Mr. Wisok]

[2] The two dissenters held only that there was insufficient evidence presented at the preliminary examination to support a bind-over on First Degree Murder, which, under Michigan Law, precludes a guilty verdict of that charge at the trial, regardless of the evidence subsequently introduced.

[3] See *People* v. *Meier*, 47 Mich., App. 179, 192-193 (1973), where the Court held that a charge of first degree murder could go to the jury where the evidence disclosed that defendant pulled a gun and shot decedent after a brief encounter at a bar.

would like to have you believe that [re discrepancies] about everything that has been offered" (TR 636). One of them was directed to the prosecutor, when the Judge said "I've been waiting for that objection for three minutes" (TR 493). The Court's comment came after Mr. Ritchie, Petitioner's counsel, had been cross examining witness Toth, one of the restaurant bouncers, regarding whether he served in Vietnam, where, his military occupation, whether he received any bronze stars, and why he was hospitalized in Vietnam (TR 492). The last four remarks directed to Mr. Ritchie included "Let's proceed with other questions...that subject is closed" (TR 260), "There is no capital punishment in this state...proceed properly (TR 528), "There's nothing inconsistent about that statement" (TR 544), and "Your reaction is a little bit too much" (TR 265). After the last remark, counsel apologized for his "outburst" and the judge benignly said that no apologies were necessary and that we all get a little intemperate.

The undersigned does not find, under any standard of judicial impropriety, that the above comments or remarks were improper or that Petitioner was denied a fair trial thereby. The comments were made during the course of a six day trial and, following which, the court carefully instructed the jury to disregard any of his remarks which may have seemed critical or intemperate and to know that the Court did not favor one side or the other (TR Vol. VI, p. 75). Any possible prejudice would have been cured by the Court's instruction.

Finally, Petitioner claims that certain remarks and lines of questioning by the prosecutor were unduly prejudicial and denied him a fair trial. First, he says that the prosecutor referred to him as a "neighborhood bully" in his opening statement. The specific argument was

> "You will see from the evidence that we have, that we know and have heard about, perhaps had personal contact with what we would call the "neighborhood bully."

> We have two of them in this case. Two bullies who carried their action to ultimate disaster towards two persons, two innocent persons."

The reference, then, was directed towards both Defendants and, in light of the subsequent testimony, was probably more applicable to Defendant Moss.[4] Petitioner's counsel did object to the use of the term "bullies" (TR 11). The term was never again injected into the trial, however and, the undersigned does not believe that its prejudicial effect, even if considered improper, rose to constitutional dimensions.[5]

Secondly, Petitioner points to two lines of questioning where the prosecutor examined him regarding his weight-lifting and physical self-image (TR 864-867) and inquired whether he had ever used his strength before to aid Mr. Moss (TR 868-870). The former questioning was proper to support the People's claim that Petitioner was someone who would not have needed to shoot the victim, once he was disarmed, to protect himself or his friend; the latter question was never answered after the Court cut off the inquiry because it could have led to improper incriminating responses (TR 870). The prosecutor's remark in closing argument, that Petitioner's "psychological make-up, what he has told you about himself, what he was thinking that night, the type of person that he is" (TR Vol. VI, p. 58), was the "motive" for what happened, was during the argument regarding premeditation, was in response to Petitioner's argument that there was no motive for the killing (TR 24, 29, 40), and there was no objection to the remark. The comment did not reasonably suggest that because of some kind of prior misconduct or prior activities

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[4] There was testimony at trial, for example, that when Moss came into the restaurant, he was in a "mean mood" (TR 501) and that he said he was going to "kick somebody's ass" (TR 69).

[5] The Court of Appeals concluded that the remark was a fair comment in light of the brutality of the crime (70 Mich. App. at p. 23); the Supreme Court did not address the claim.

Petitioner therefore more likely to have committed the instant crime, but rather was primarily directed to avoiding any claim of self defense or "friend-defense." Again, it does not appear that the prosecutor's questions or argument were of such a prejudicial nature as to have violated Petitioner's right to fair trial.

Accordingly, for all of the foregoing reasons, it is recommended that the instant Petition For a Writ of Habeas Corpus be dismissed.

s/ THOMAS A. CARLSON
THOMAS A. CARLSON
United States Magistrate

DATED: May 28, 1980

A TRUE COPY
Clerk, U.S. District Court
Eastern District of Michigan
By: s/ Illegible
Deputy Clerk

cc: Judge Pratt
Kenneth Fishman
Sherwin Vine

APPENDIX E

Constitutional Provision

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.